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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 812

JOSEPH GORSKA,

Petitioner,

against

PENNSYLVANIA RAILROAD COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit, affirming the judgment of the United States District Court for the Southern District of New York, is reported in 262 F. 2d 198. The opinion of the United States District Court is unreported but is set forth in the appendix at pages 38a-43a.

Jurisdiction

The petitioner alleges that the jurisdiction of this Court is invoked under Title 28 U.S.C. §1257 which applies to the procedure to be followed in reviews by this Court of final state court judgments or decrees and is clearly inapplicable.

Question Presented

Whether or not certiorari should be granted to review a judgment of the Court of Appeals for the Second Circuit which affirmed a judgment of the District Court in favor of the respondent after a non-jury trial of contested fact issues which were resolved in favor of the respondent on findings of fact which are obviously not clearly erroneous within the purview of Rule 52(a) of the Federal Rules of Civil Procedure but are based upon substantial evidence.

ARGUMENT

The petitioner has not cited any special or important reason for this Court to exercise its judicial discretion to grant a writ of certiorari.

A. The judgment of the Court of Appeals affirming the finding of fact of the District Court as not clearly erroneous is manifestly correct.

The question allegedly presented by the petitioner (Petition, p. 2) is not truly presented. The petition although assigning some eight reasons as to why a writ of certiorari should be granted actually is an attempt to have this Court review and invalidate findings of fact, after a non-jury trial, which are based on substantial evidence and which were unanimously held not to be clearly erroneous by the Court of Appeals for the Second Circuit within the purview of Rule 52(a) of the Federal Rules of Civil Procedure.

This action was brought by petitioner under the Jones Act (46 U.S.C. §688) to recover damages for personal injuries allegedly sustained by him as a result of the alleged negligence of the respondent while he was employed as a crew member of the respondent's tugboat. A statement of the facts will be found in the opinion of the District Court (Appendix 38a-43a).

There were conflicting issues of fact which were dependent upon the credibility of the witnesses. The Trial Court, sitting without a jury, as finder of the facts, was required to resolve these conflicting issues and did so in favor of the respondent.

The third, fifth and seventh reasons offered by petitioner for granting the writ (Petition, pp. 2 and 3) are directed to the application of Rule 52(a) of the Federal Rules of Civil Procedure as applied in this action. The substantial evidence in the record clearly establishes that this rule was correctly applied in the instant case and neither the rule nor its interpretation under the particular set of facts of this case has affected any remedies granted by Congress to seamen in actions of this nature.

The Court of Appeals, whose judgment is sought to be reviewed here, correctly applied Rule 52(a) of the Federal Rules of Civil Procedure as interpreted by this Court.

Rule 52(a) defines the effect of findings by a trial court in a non-jury case as follows:

> "*Rule 52. Findings by the Court.*
>
> (a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; * * * Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. * * *"

This Court interpreted Rule 52(a) in *United States* v. *U. S. Gypsum Co.*, 333 U. S. 364, using this language at pages 394, 395:

> "Rule 52(a) of the Rules of Civil Procedure is applicable. That rule prescribes the findings of fact in actions tried without a jury 'shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.' . . . A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

In the case at bar it cannot be said in view of the sharply contested issues of fact and in view of the substantial evidence in favor of the respondent that there is room for any conclusion that a mistake has been committed. The Trial Court, sitting without a jury, heard and observed many witnesses including the petitioner; and received and weighed documentary and demonstrative proof. It had the duty to observe the witnesses, judge their credibility, weigh the evidence and make an appraisal of the facts. This the Trial Court conscientiously and ably did and after due deliberation resolved the conflicting issues of fact in favor of respondent. Under these circumstances there is no sound judicial reason for the granting of certiorari.

As stated in *United States* v. *Oregon State Medical Society*, 343 U. S. 326, at page 330:

> "The appeal brings to us no important questions of law or unsettled problems of statutory construction. It is much like *United States* v. *Yellow Cab Co.*, 338 U. S. 338. Its issues are solely ones of fact."

and again at page 332:

> "We are asked in substance to try the case de novo on the record, make findings and determine the nature

and form of relief. We have heretofore declined to give such scope to our review. *United States* v. *Yellow Cab Co., supra.*"

The fourth reason presented in the petition (Petition, p. 2) referring to the fact that the District Court found in favor of the petitioner on the cause of action for Maintenance and Cure (which has been disposed of and is not before this Court) and alleging that the District Court applied a different rule with respect to the degree of proof required, ignores the elementary proposition that a seaman may recover for Maintenance and Cure without a showing of any negligence on the part of the defendant.

B. There is no conflict of decision on the same matters herein with any other Court of Appeals nor is there any important question of federal law involved.

The petitioner in the first and second reasons offered in the petition (Petition, p. 2) states that the decision of the Court of Appeals conflicts with the decision of the Court of Appeals for the Seventh Circuit in *Wheat* v. *Baltimore & Ohio Railroad Company*, 262 F. 2d 289 and with the decision of the New York State Court of Appeals in *Williams* v. *Alexander*, 309 N. Y. 283.

Analysis of the cases which petitioner cites as representing a conflict with the opinion of the Court below clearly establishes that there is no such conflict.

Wheat v. *Baltimore & Ohio Railroad Company*, 262 F. 2d, 289, involved an accident arising out of a railroad crossing collision. The District Court set aside a jury verdict in favor of plaintiffs. On the ground that the plaintiffs were guilty of contributory negligence as a matter of law when they failed to look and listen as their automobile approached the railroad crossing the Court of Appeals for the Seventh Circuit affirmed. In asserting that there is a conflict between this decision and the decision below the petitioner points to the fact that the Seventh Circuit rejected the testimony of witnesses that a bell or whistle

had not sounded when the witnesses were not shown to have been in such proximity that they could have heard such a bell or whistle if it had in fact sounded.

In the case at bar the Court below applied exactly the same rule of law to the testimony of the captain and other crew members who were on the tug and barge with respect to whether or not there had been an impact. Here, however, these witnesses were very definitely in close proximity to the place where the petitioner alleges the impact occurred.

In *Williams* v. *Alexander*, 309 N. Y. 283 the New York Court of Appeals held that the portion of a hospital record containing a history of the accident is inadmissible under New York Civil Practice Act, § 374(a) unless the history is necessary to the physician for purposes of treatment or diagnosis. This holding is directed to the question of whether or not such material is admissible in evidence and can have absolutely no bearing on the case at bar since the petitioner himself offered the entire hospital record into evidence without restriction.

Under any circumstances the Trial Court would not be restricted by the rule of the *Williams* case since Rule 43(a) of the Federal Rules of Civil Procedure permits the adoption of any rule (Federal or State) which favors the reception of evidence.

The sixth and eighth reasons offered in the petition (p. 3) are a transparent attempt to indicate that there is an important question of Federal law involved herein. These points refer to the question of admissibility of evidence and the probative force of so-called negative testimony; and the alleged conflict between the decision of the Court below and the decision of the Courts in the *Wheat* case, *supra*, page 5 and the *Williams* case, *supra*, page 5.

The decision of the Court below is said to be based upon "negative testimony", "hearsay evidence", "incorrect inference", "speculation", "surmise", "conjecture" and

"remote possibility". This ignores the fact that the District Court in rejecting the testimony of the petitioner herein held, that since there was no other proof offered of any negligence on the part of the respondent, the petitioner had failed to sustain his burden. While other statements of the District Court help to elucidate the reasons for its decision, the disbelief of the petitioner's testimony by the Trial Court sitting without a jury necessitated a judgment in favor of the respondent. The discounting of the petitioner's testimony was well supported by the record as pointed out by the Court of Appeals in affirming the Trial Court in the following language (Petition, p. 35):

> "Judge Murphy's discounting of Gorska's version of the cause of his injury is well supported by the record."

CONCLUSION

It is respectfully submitted, that, there being no basis for the writ, the petition should be denied.

Respectfully submitted,

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